

Fair Political Practices Commission
MEMORANDUM

To: Chairman Getman, Commissioners Downey, Knox and Swanson

From: Carla Wardlow, Chief, Technical Assistance Division
Hyla Wagner, Counsel, Legal Division
Luisa Menchaca, General Counsel

Date: February 28, 2002

Subject: Pre-notice Discussion of Amendments to Lobbying Disclosure
Regulations: 18239—Definition of Lobbyist; 18615—Accounting
by Lobbyist Employers and Persons Spending \$5,000 or More to
Influence Legislative or Administrative Action; and 18616—
Reporting by Lobbyist Employers and Persons Spending \$5,000
or More to Influence Legislative or Administrative Action

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Introduction

Legislative amendments to the lobbying disclosure provisions of the Political Reform Act¹ were enacted last year. (AB 1325; Chapter 921, Stats. 2001; copy attached.) The amendments codified existing provisions in the Commission's regulations related to reporting of payments to influence proceedings before the Public Utilities Commission (PUC). As a result, conforming changes to the regulations are needed.

Background

The Act requires disclosure of payments made to influence the actions of the State Legislature and state administrative agencies. Individuals who qualify as "lobbyists" and entities that qualify as "lobbying firms" under the Act, as well as their employers and clients ("lobbyist employers"), must register and file quarterly reports disclosing these payments. (Section 86100 *et seq.*) Persons that do not employ a lobbyist or a lobbying firm but make certain lobbying payments totaling \$5,000 or more in a calendar quarter also must disclose their payments ("\$5,000 filers").

Approximately 1,150 individual lobbyists, 350 lobbying firms, and 2,500 lobbyist employers/clients are currently registered with the Secretary of State. Lobbyist employers represent many interest groups, including local government, business entities, trade and professional associations, labor unions, charitable and social organizations, etc. Quarterly disclosure reports of lobbyist employers must include the following

¹ Gov. Code sections 81000-91015. All references are to the Government Code unless otherwise noted.

information: legislative bills or administrative matters lobbied, payments made to lobbyists and lobbying firms, gifts and other benefits provided to legislative or agency officials, and campaign contributions. Lobbyist employers also must disclose “other payments to influence legislative or administrative action.” (Section 86116(h); regulation 18616.) This is a very broad category of disclosure that includes overhead, compensation paid to non-lobbyists, and other expenses related to the employer’s lobbying activities.²

Prior to January 1, 2002, section 82002 defined the term “administrative action” as follows:³

“Administrative action” means the proposal, drafting, development, consideration, amendment, enactment or defeat by any state agency of any rule, regulation or other action in any rate-making proceeding or any quasi-legislative proceeding, which shall include any proceeding governed by Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2. (Emphasis added.)

The term “legislative action” is defined in section 82027:

“Legislative action” means the drafting, introduction, consideration, modification, enactment or defeat of any bill, resolution, amendment, report, nomination or other matter by the Legislature or by either house or any committee, subcommittee, joint or select committee thereof, or by a member or employee of the Legislature acting in his official capacity. “Legislative action” also means the action of the Governor in approving or vetoing any bill.

Prior to January 1, 2002, section 82039 defined the term “lobbyist” as follows:

“Lobbyist” means any individual who receives two thousand dollars (\$2,000) or more in economic consideration in a calendar month, other than reimbursement for reasonable travel expenses, or whose principal duties as an employee are to communicate directly or through his or her agents with any elective state official, agency official, or legislative official for the purpose of influencing legislative or administrative action. No individual is a lobbyist by reason of activities described in Section 86300.

² The reports filed by \$5,000 filers must include all of the same information, except that these filers do not make payments to lobbyists or lobbying firms.

³ AB 1325 amended sections 82002 (“administrative action”), 82039 (“lobbyist”) and 86116 (contents of lobbyist employer/\$5,000 filer reports).

A “lobbyist employer” is any person that employs or contracts for the services of a lobbyist for the purpose of influencing legislative or administrative action. (Section 82039.5)

Regulation 18239 explains how the \$2,000 threshold and “principal duties” test contained in section 82039 are to be applied to determine when an individual qualifies as a lobbyist (which also determines when the individual’s employer or client qualifies as a lobbyist employer). The regulation also contains an exception to the lobbyist definition for certain appearances before state agencies. The regulation provides that individuals need not count time spent engaging in “administrative testimony” for purposes of determining whether they qualify as lobbyists.

The administrative testimony exception was first adopted by the Commission in 1975 (originally referred to as “hours of public testimony”) and means, generally, testimony given before a state administrative agency in a publicly noticed and recorded hearing to which full public access is provided. (See regulation 18239(d)(1)(A).) Although administrative testimony will not qualify an individual as a lobbyist under the Act, payments for administrative testimony are reportable by lobbyist employers (an entity that qualifies as a lobbyist employer because it engages in other types of lobbying activities, such as attempting to influence the legislature). The lobbyist employer reports these payments as “other payments to influence legislative or administrative action.”

Over the years, several attempts have been made to clarify, simplify, or reduce reporting of payments in connection with activities before the PUC.⁴ In the 1980s, representatives from the PUC and utility companies expressed concern that the Act’s reporting requirements related to PUC ratemaking proceedings were overbroad, resulting in a misleading image that the utilities were expending huge sums on lobbying activities when, in fact, their participation in PUC proceedings was mandatory, rather than voluntary. For example, at that time, the utilities were required to include as “other payments” hundreds of hours of employee time spent compiling data and statistics in connection with rate applications and other ratemaking proceedings.

In 1986, this Commission adopted regulation 18616 which, among other things, reduced reporting in connection with “administrative testimony in ratemaking proceedings before the PUC.” The regulation limited the reporting requirement to payments to attorneys for time spent appearing as counsel and payments to witnesses for time spent testifying in the proceedings.

In 1990, Pacific Telesis Group petitioned the Commission to further expand the reporting exception to include other types of regulatory proceedings conducted by the PUC that were ancillary to ratemaking and to other quasi-legislative proceedings that did not meet the definition of “administrative testimony” contained in regulation 18239. After several

⁴ The PUC is a state administrative agency and attempts to influence the PUC are attempts to influence “administrative action” as defined in the Act. Most of the entities that appear before the PUC are lobbyist employers. Therefore, payments made by these entities to appear before the PUC are reportable.

hearings, the regulation was amended in 1993 to include in the definition of administrative testimony “an application, complaint, investigation, rulemaking, alternative dispute resolution procedures in lieu of formal proceedings as may be sponsored or endorsed by the California Public Utilities Commission, or other formal proceeding before the California Public Utilities Commission.” (Regulation 18239(d)(1)(B) and (C).) At the same time, regulation 18616 was amended to remove references to “ratemaking proceedings” and apply the reporting exception to the broader range of activities covered under the new definition of administrative testimony.

In 1996, Proposition 208 amended the definition of “lobbyist” in section 82039, which required the Commission to amend regulation 18239. During that process, the Commission considered, but did not approve, a proposal to repeal the administrative testimony exception in the regulation.

2001 Legislative Amendments

As originally introduced in February 2001, the purpose of AB 1325 was to overturn the reduced reporting provisions contained in regulations 18239 and 18616. Following is an excerpt from the legislative bill analysis submitted to the Assembly Committee on Elections, Reapportionment and Constitutional Amendments on April 17, 2001:

According to the author, the PRA regulates the lobbying of the Governor, Legislature, and state agencies. The Fair Political Practices Commission (FPPC) “is given discretion in defining how one qualifies as a lobbyist and in determining which expenses associated with lobbying must be reported. . . .Current interpretations of [the PRA] by the FPPC exempt from lobbyist qualification, and significantly reduce the reporting of spending on, attempts to influence specified types of proceedings before the PUC but do not provide the same exemptions for attempts to influence similar proceedings before other state agencies.” The author claims that these exceptions “go substantially beyond the scope of permitted exceptions under the Political Reform Act. This bill would ensure that individuals and entities that lobby the PUC comply with the same lobbying and lobbyist reporting rules that apply to individuals and entities that lobby other state agencies.”

AB 1325 was amended several times⁵ and, as chaptered on October 14, 2001, essentially codifies the exceptions established in the regulations--the only difference being that time spent by attorneys and witnesses preparing to appear or testify before the PUC now must be reported.

⁵ AB 1325 was amended on April 5, 2001, May 21, 2001, June 18, 2001, July 9, 2001, and July 20, 2001.

The legislation left the basic definitions of “administrative action” and “lobbyist” in sections 82002 and 82039 unchanged, but added new subdivisions to each definition specifically addressing PUC proceedings. Effective January 1, 2002, the definition of “administrative action” in section 82002 was amended to add subdivisions (b) and (c) defining “ratemaking proceeding” and “quasi-legislative proceeding” for purposes of proceedings before the PUC. Section 82002 now reads:

(a) “Administrative action” means the proposal, drafting development, consideration, amendment, enactment, or defeat by any state agency of any rule, regulation, or other action in any ratemaking proceeding or any quasi-legislative proceeding, which shall include any proceeding governed by Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2.

(b) “Ratemaking proceeding” means, for the purposes of a proceeding before the Public Utilities Commission, any proceeding in which it is reasonably foreseeable that a rate will be established, including, but not limited to, general rate cases, performance-based ratemaking, and other ratesetting mechanisms.

(c) “Quasi-legislative proceeding” means, for purposes of a proceeding before the Public Utilities Commission, any proceeding that involves consideration of the establishment of a policy that will apply generally to a group or class of persons including, but not limited to, rulemakings and investigations that may establish rules affecting an entire industry.

AB 1325 also added a new subdivision (b) to section 82039, defining “lobbyist:”

(a) “Lobbyist” means any individual who receives two thousand dollars (\$2,000) or more in economic consideration in a calendar month, other than reimbursement for reasonable travel expenses, or whose principal duties as an employee are, to communicate directly or through his or her agents with any elective state official, agency official, or legislative official for the purpose of influencing legislative or administrative action. An individual is not a lobbyist by reason of activities described in Section 86300.

(b) For the purposes of subdivision (a), a proceeding before the Public Utilities Commission constitutes “administrative action” if it meets any of the definitions set forth in subdivision (b) or (c) of Section 82002. However, a communication made for the purpose of influencing this

type of Public Utilities Commission proceeding is not within subdivision (a) if the communication is made at a public hearing, public workshop or other public forum that is part of the proceeding, or if the communication is included in the official record of the proceeding.

Section 86116, which specifies the content of lobbyist employer disclosure reports, also was amended to include the limited reporting provision for payments to attorneys and witnesses for time spent appearing as counsel or testifying in PUC proceedings and for related preparation time.

As a result of these changes, staff has drafted proposed amendments to regulations 18239, 18615, and 18616 to bring them into conformity with the statute. The proposed amendments are more technical than substantive.

Regulation 18239—Definition of Lobbyist

The current definition of “administrative testimony” in regulation 18239(d)(1)(B) and (C) identifies specific proceedings before the PUC:

...(C) For purposes of this subdivision, “regulatory proceeding before the California Public Utilities Commission” means an application, complaint, investigation, rulemaking, alternative dispute resolution procedures in lieu of formal proceedings as may be sponsored or endorsed by the California Public Utilities Commission, or other formal proceeding before the California Public Utilities Commission.

This language is superseded by the new statutory definitions of “ratemaking proceeding” and “quasi-legislative proceeding” in section 82002(b) and (c) and staff proposes that it be deleted. In addition, section 82039(b) now creates an exception to the definition of “lobbyist” for communications made “at a public hearing, public workshop, public forum, or included in the official record of any proceeding, as defined in Government Code section 82002(b) or (c), before the California Public Utilities Commission.” Staff proposes adding this language to the definition of “administrative testimony” in 18239(d)(1)(B). This is reflected on page 2 of draft regulation 18239, attached.

A technical amendment also has been made to subdivision (d)(5) on page 3 of the draft regulation to clarify that local elected officials are not covered by the lobbying disclosure rules. The word “state” has been inserted in subdivision (d)(5)(A).

Regulation 18615—Accounting by Lobbyist Employers and Persons Spending \$5,000 or More to Influence Legislative or Administrative Action

Technical amendments to this regulation are needed to conform to the new language of the statute and to add payments for preparation time to the recordkeeping requirements for lobbyist employers and \$5,000 filers.

Regulation 18616—Reporting by Lobbyist Employers and Persons Spending \$5,000 or More to Influence Legislative or Administrative Action

AB 1325 amended section 86116 to add subdivision (h)(2) specifying the reporting requirements for “other payments to influence legislative or administrative action” made in connection with proceedings before the PUC:

(2) A filer that makes payments to influence a ratemaking or quasi-legislative proceeding before the Public Utilities Commission, as defined in subdivision (b) or (c), respectively, of Section 82002, may, in lieu of reporting those payments pursuant to paragraph (1), report only the portion of those payments made to or for the filer’s attorneys for time spent appearing as counsel and preparing to appear as counsel, or to or for the filer’s witnesses for time spent testifying and preparing to testify, in this type of Public Utilities Commission proceeding. This alternative reporting of these payments made during a calendar month is not required to include payments made to an attorney or witness who is an employee of the filer if less than 10 percent of his or her compensated time in that month was spent in appearing, testifying, or preparing to appear or testify before the Public Utilities Commission in a ratemaking or quasi-legislative proceeding. For the purposes of this paragraph, time spent preparing to appear or preparing to testify does not include time spent preparing written testimony.

This section supersedes the existing language in regulation 18616(g)(5) related to PUC proceedings.

Staff has presented two options for amending regulation 18616(g)(5). In **Option 1** on page 6 of the draft regulation, the existing language spelling out the types of PUC-related payments that must be reported has been amended to conform to the new statutory language in section 86116(h)(2), including the new requirement that payments for preparation time by attorneys and witnesses be reported. In **Option 2**, the existing language is deleted and no new language is proposed on the basis that the new language in section 86116(h)(2) is very specific and needs no further clarification.

At the interested persons meeting held on February 1, 2002, there was a general consensus that including the statutory language in regulation 18616(g)(5) is helpful to the regulated community because all of the exceptions to reporting will remain in one place.

There also was some discussion whether new regulatory language is needed to clarify the last sentence of new section 86116(h)(2), which states that time spent by attorneys and witnesses preparing to appear or preparing to testify before the PUC does not include time spent preparing “written testimony.” Staff has received no specific questions or information that would assist us in developing regulatory language for the Commission to consider at this time. Staff recommends that the Commission approve the proposed amendments now, and allow the regulated community and staff additional time to determine whether regulatory clarification should be added later on.

Recommendation

Staff recommends that the Commission approve the amendments for public notice. If the Commission selects an option for amendment of regulation 18616, only that option will be presented for adoption.